IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 91 OF 2015

MARCO S/O MHAGAMA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Jundu, J.)

Dated the 15th day of August, 2008
in
(DC) Criminal Appeal No. 15 of 2008

JUDGMENT OF THE COURT

3rd & 5th day of August, 2016

JUMA, J.A.:

This case is yet another example of delays, which tarnish the image of the courts in Tanzania. Twelve years ago on 12th October 2004 the appellant, **Marco s/o Mhagama**, was 59 years old when the District Court of Ludewa, convicted him of the offence which was described in the charge sheet as:

"Rape c/s 130 (1) and 131 (1) of the Penal Code Cap. 16 of the Laws as Repealed and Replaced by Section 5 and 6 as amended by Sexual Offences Act No. 4/98."

He immediately expressed his intention to appeal to the High Court and lodged his request for a copy of the judgment of the trial court. The following year (sometime in 2005) he presented his appeal, DC Criminal Appeal, in the High Court at Mbeya. It took another two years up to 19th December, 2007 for the Mbeya Registry to realize that the appeal the appellant intended, fell under the jurisdiction of another High Court Registry— the Iringa High Court Registry. An order of transfer was accordingly issued. Once in the Iringa High Court Registry, the appeal was renumbered to become DC Criminal Appeal No. 15 of 2008. The record of the trial court has only 24 typed pages. It is hard for an ordinary citizen to understand why it took three years from 2005 for the record of proceedings in the trial court to be typed and for the Mbeya High Court Registry to realize that the matter belongs to the neighbouring Iringa registry.

Sharing of information between court registries and appellants serving terms in prison is another area of concern which invariably contributes to delays. The appellant was absent when his first appeal was finally heard on 30th July, 2008. He was similarly absent on 15th August, 2008 when Jundu, J. (as he then was) delivered his judgment. Another eight (8) years of unexplained case file activities passed before his second and final appeal was to be conclusively heard in the Court of Appeal on 3rd August, 2016.

The particulars of the offence for which the appellant was charged alleged that on the 21st August 2002, at Mavanga village, Ludewa District of Iringa Region, he had an unlawful carnal knowledge of a five year old girl, Veronica d/o Mtweve.

The background facts as recounted by the five prosecution witnesses show that on 21st August 2002 at around 4:00 Kevin Mtweve (PW3) was at his home. As he was passing by the appellant's house, he saw him having sexual intercourse with the complainant who was crying. The victim's father, Leo s/o Mtweve (PW2), testified that when he returned back home from his farm, PW2 reported the rape to him. PW2 alerted his neighbours

who assisted to arrest the appellant and marched him to the Ward Executive Officer (WEO).

Hieromynus Wendelin Kayombo (PW5) who was the Ward Executive Officer (WEO) stationed at Millo, testified how the appellant was brought to his office on suspicion that he had raped three daughters from his Mbugani village. At first, according to PW5, the appellant had denied the accusation. But he admitted after interrogation. WEO allowed the parents of the three daughters to take them to hospital at Mavanga.

But the records of this appeal show that only the complainant was taken to the Health Centre at Mavanga. The record has not gone further to identify who, the other "three daughters" were. Flavian Mgaya (PW4) was employed as a Clinical Officer at Mavanga Mission Health Centre attending to patients. He testified how he examined the complainant on 22nd August, 2002 following her rape. Upon observation, her hymen had been perforated. PW4 tendered a medical examination report described as "medical chit". This document was admitted as exhibit P2.

Apparently, some six days later the complainant was subjected to a second medical examination. PW1, Taifa s/o Kanyika, testified that on 28th

August 2002 he was working as a Clinical Officer at Mlangali Health Centre when he received the complainant who had been referred to the hospital by Mlangali Police Station with a PF3. The complainant informed PW1 that she had been raped at her home. PW1 prepared a medical examination report (PF3) which the trial court received as exhibit P1. Apart from her own father who testified as PW2, the complainant did not testify.

In his sworn testimony the appellant reiterated his denial that he had had sexual intercourse with the complainant.

After receiving evidence from five prosecution witnesses and the appellant's own defence, the trial magistrate (E.K. Mwambeta-DM) was satisfied that the accused was involved in committing the offence he was charged with, and the prosecution had proved its case beyond reasonable doubt. Upon entering the conviction, the trial magistrate sentenced the appellant to serve life imprisonment.

The appellant's first appeal, DC Criminal Appeal No. 15 of 2008 was dismissed by the High Court at Iringa. Jundu, J. (as he then was) concluded that the appellant's defence neither shook nor cast any doubt on the evidence brought by the prosecution.

In his second appeal to this Court, the appellant preferred a total of seven grounds of appeal, out of which four grounds stand out. In his **first** ground, the appellant faulted the first appellate Judge for relying on the evidence of PW5 who told the trial court that the appellant was taken to him on allegation that he had raped three daughters of his fellow Mbugani villagers. The appellant wondered, why no witness came forward to explain who these three daughters were, how and why they failed to report to the police. In his **second** ground, the appellant wondered why, the two courts below failed to question the veracity of the evidence of the clinical officer who testified as PW1. If this clinical officer had claimed that he examined the complainant on 28th August, 2002, the appellant wondered why the police at Mlangali Police Station issued the medical examination form (PF3) on a different date i.e. on 29th August, 2002. He also questioned the veracity of the evidence of the second Clinical Officer (PW4), who claimed to have examined the victim on 22nd August, 2002. The appellant again expressed his surprise why, if the incident of rape ever occurred, the two clinical officers (PW1 and PW4) went ahead to examine the victim of alleged rape without any prior reference from the Police through the Form No 3 (PF3).

In his **third** ground of appeal, the appellant contends that he should not have been charged and convicted of the rape of a girl of under the age of 18 where not a single witness had testified to confirm the girl's age. He complained that the age of the girl alleged in the charge sheet was not proved by any evidence. In the **fourth** ground, the appellant faults the two courts below for failing to take into account his defence.

At the hearing of the appeal, the appellant appeared in person while the respondent Republic was represented by the learned Senior State Attorney, Ms. Lillian Ngilangwa. The learned Senior State Attorney supported the appeal. She submitted on three salient matters to amplify her conclusion that the appellant's conviction is unsustainable and this appeal before us is meritorious.

Firstly, Ms. Ngilangwa expressed her concern over the evidential gap created by the failure of the complainant to testify. She submitted that the evidence of the victim of rape is the best evidence to prove rape, it invariably proves her own age which is an important ingredient of the offence of rape where the victim of under 18 years of age. Had the victim testified, her evidence would have provided the best account on the

perpetrator of her rape and how the rape and penetration were actually committed. The learned Senior State Attorney referred us to the record of the Preliminary Hearing wherein the victim and her mother were listed as prosecution witnesses. Yet, these two crucial witnesses neither testified, nor were their failure to testify explained.

Secondly, she submitted that in the absence of the testimony of the victim and her mother, the prosecution had to rely on the evidence of a witness (PW3) who claimed to have witnessed the rape and the evidence of two Clinical Officers (PW1 and PW4)— to prove that the victim was raped by the appellant. She highlighted the shortcomings of the evidence of PW3 as an eye-witness account of the incident of rape as it occurred. This witness (PW3) the learned Senior State Attorney submitted, did not provide sufficient details on how he actually saw the rape unfolding, where he was positioned to be able to see what the appellant was doing to the victim.

She further questioned the probity of the evidence of the two clinical officers, specifically taking into account that the police at Mlangali appeared to have issued the PF3 (exhibit P1) much later after the

complainant had gone to hospital. She pointed out that although the police issued the PF3 on 29th August, 2002 to refer the complainant to hospital for medical examination and treatment; a week earlier the complainant had already presented herself at Mavanga Mission Health Centre where she was examined by PW4 and issued with a medical attendance report (exhibit P2). She similarly questioned the probity of the evidence of the second Clinical Officer (PW1), who examined the victim on 28th August, 2002 a day before the PF3 was issued.

The learned Senior State Attorney next submitted that the two courts below did not sufficiently evaluate the evidence to remove a shadow of doubt that still surrounds the evidence of the so called eye witness (PW3) and of the two clinical officers. The shadow becomes prominent, she submitted, when their evidence is compared with the evidence of the WEO (PW5) who claimed that the appellant was arrested on suspicion of raping three girls. She added that it is not clear if the complainant was amongst the three girls and wondered whether the three girls had reported to the police and issued with the PF3 for their medical examination and treatment in hospital.

To make the probity of the medical examination reports of the two Clinical Officers (exhibits P1 and P2) even more suspicious, the Senior State Attorney drew our attention to the fact that exhibit P1 was tendered and exhibited as evidence twice. It was for the first time exhibited during the Preliminary Hearing on 10th December, 2002. It was for the second time tendered when PW1 testified on 11th November, 2003. In both occasions, she added, the contents of exhibit P1 were not read out to the appellant as the trial courts are obliged to.

To amplify her submission that exhibit P1 lacks probative value worth basing any conviction, the learned Senior State Attorney referred us to **Walii Abdallah Kibutwa, Kadili Ahmad and Happy Balama vs. R.**, Criminal Appeal No. 181 of 2006 which reproduced a statement of law the Court had earlier made in **Robinson Mwanjisi and Three Others vs. R.**, Criminal Appeal No. 154 of 1994 (both unreported) directing that when:

> *"...it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out..."*

To compound the problem, she submitted that the exhibition of the PF3 as evidence did not comply with the mandatory provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20. She referred us to one of the decisions of the Court on the matter— **Sprian Justine Tarimo vs. R.**, Criminal Appeal No. 226 of 2007 (unreported) where the Court stated:

> *"...This Court has held on numerous occasions that once the medical report as PF3 has been received in evidence under section 240 (1) of the Act it becomes imperative on the trial court to inform the accused of his right of cross-examining the medical witness who prepared it..... The Court has, as a result, held that if such report is received in evidence without complying with the provisions of section 240 (3) of the Act, it should not be acted upon."*

The **third** salient area over which the learned Senior State Attorney considered as vitiating the appellant's conviction is the statement of the offence (c/s 130 and 131(1) of the Penal Code) preferred in the charge sheet. She submitted that the cited provisions neither relates to the particulars of the offence shown nor do they inform the appellant the impending sentence of life imprisonment should he be convicted. On that

defective charge sheet, we were urged to find that the appellant was wrongly charged, convicted and sentenced.

When his moment came for him to respond, the appellant had nothing to add other than to support the learned Senior State Attorney's submission. He expressed his regret over the long time he had spent in prison while pursuing his right to be heard on appeals. This delay has affected his eye-sight, he submitted to us.

We have considered the grounds of appeal and the oral submissions made by the learned State Attorney through which she supports the appellant's appeal. On second appeal like the instant one is; our concern is restricted to the determination of matters of law. The second appellate court rarely interferes with the concurrent findings of facts made by the two courts below, unless there is misapprehension of evidence occasioning injustice. In her detailed submissions, Ms. Ngilangwa has highlighted the misapprehensions of evidence of prosecution witnesses which she submits call for our intervention by allowing the appeal.

We propose to begin with the issue of the charge sheet, which is a question of law worth the attention of the Court sitting on second appeal.

The appellant was charged under sections 130 (1) and 131 (1) of the Penal Code which provides:

> ***"130.-(1)*** *It is an offence for a male person to rape a girl or a woman.*
>
> ***131****.-(1) Any person who commits rape is, except in the cases provided for in subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."*

Because the particulars of the offence of rape levelled against the appellant indicate that his victim was a five-year old girl. The appellant was entitled to know, not only the provisions punishing rape of girls of under the age of 18, but also the sentence he is likely to face should he be convicted. If the particulars of the offence are to go by, the statement of the offence in charge sheet should also have included— **sections 130 (2) (e) and 131 (3)**. As the learned Senior State Attorney correctly submitted

in this regard, these two provisions were not cited in the charge sheet. They provide:-

> ***130 (2)*** *A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> ...
>
> *(e) with or without her consent* ***when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.* [Emphasis added].
>
> ***131 (3)****- Subject to the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment.*

Like the instant appeal before us, in **Marekano Ramadhani vs. R.,** Criminal Appeal No 202 of 2013 (unreported), the appellant was charged with, and convicted of rape contrary to section 130 and 131 of the Penal Code. Mr. Juma Ramadhani, learned Principal State Attorney conceded that

the statement of offence in the charge sheet did not disclose the specific category of the offence of rape against which the appellant was charged. The Court made the following observation which are as pertinent to the instant appeal before us:

> *"...it is a mandatory requirement under section 135 of the Criminal Procedure Act, that a charge sheet should describe the offences* ***and should make reference to the section of the law creating the offence****. In another case- Criminal Appeal no. 144 of 2008 between* ***Simba Nyangura and the Republic*** *(unreported) where the appellant had been charged for rape under section 130 (1) and 131 of the Penal Code the Court observed that In a charge of rape an accused person must know under which of the descriptions (a) to (e) in section 130 (2) the offence he faces falls, so that he can be prepared for his defence....."* [Emphasis added].

In **Godfrey s/o Mkinga vs. R.**, Criminal Appeal No. 176 of 2014 (unreported) which was delivered in Iringa on 21st July, 2016, the appellant was charged with the offence of rape contrary to sections 130 (1) and 131 (1) of the Penal Code. The Court observed:

"...At the beginning we extracted the charge sheet to show that, the appellant was charged under section 130 (1) and 131 (1) of the Penal Code. The offence of rape is created by section 130 (1) of the Penal Code in the following words:-

'It is an offence for a male person to rape a girl or a woman'

However, ***to determine whether the offence of rape has been committed, section 130 (1) must be read together with section 130 (2) (a)-(e)*** *of the Penal Code which classifies circumstances under which a male person commits rape...."* [Emphasis added].

We agree with the learned Senior State Attorney that the charge sheet levelled against the appellant is defective, and cannot sustain the conviction which was entered by the trial court and later sustained by the first appellate court. This means, all the proceedings before the trial court including the judgment and sentence were a nullity. Similarly, the subsequent proceedings in the High Court on first appeal and the resulting Judgment were a nullity.

We next deal with the question regarding the weight to be attached to the evidence of PW3, medical examination reports (exhibits P1 and P2) and evidence of the clinical officers, PW1 and PW4. Although these pieces of evidence were discredited by the learned Senior State Attorney; the trial District Magistrate relied on these very pieces of evidence to convict the appellant:

> *"...I find that the accused was involved in raping one Veronika d/o Mtweve (5 yrs. old girl).*
>
> *Firstly there is evidence by PW3 who found and saw the accused while forcibly sexing (sic) the victim Veronika d/o Mtweve in one of the accused person's un-piastered Makamba. PW3 having seen the incident reported the issue to PW2 who arranged for the arrest of the accused to the Kitongoji chairman and eventually to the Ward Executive Office. The event took place in the brand (sic) sunlight when PW3 had seen the accused forcely (sic) sexing the victim and who was crying.*
>
> *Secondly there is ample evidence on exhibit P1 (PF3) and Exhibit P2 (medical chit) are report after observation of the two clinical officers who are PW1 and PW4 ...*
>
> *Thirdly, there is evidence that the accused had after the three daughters were attended by PW4 at the Mavanga Rural Health Centre.....conceded to have been involved in raping the victim Veronika d/o Mtweve.*

From the above reasons I am satisfied that the accused was involved in committing the offence he stands tried before this court. I find that the prosecution case has been proved beyond all reasonable doubt."

The first appellate court (Jundu, J.) concurred with the trial court that the sexual penetration of the complainant was proved beyond reasonable doubt. It also concurred with the trial court that it was the appellant who raped the complainant:

"...This evidence of PW3 is direct evidence and not hearsay or circumstantial evidence as contended by the appellant in his Memorandum of Appeal. There was also the evidence of PW2, the father of the victim that he had arrested the appellant at the scene of crime while he was still with the victim child after he had raped her as conveyed to him by PW3. There was also the evidence of PW5, the Ward Executive Officer who is also the Justice of Peace that the appellant had admitted before him that he had raped the victim. In my considered view, the said evidence of PW2, PW3 and PW5 proves beyond reasonable doubt that it was the appellant and nobody else who had raped the victim child, that is Veronika d/o Mtweve."

We think that the learned Senior State Attorney is right to submit that the concurrent finding of facts by the two courts was based on a

misapprehension of the weight, nature and the quality of the evidence of PW3, medical examination reports (exhibits P1 and P2) and evidence of the two clinical officers, PW1 and PW4. This Court has in similar cases of misapprehension of evidence, interfered with concurrent finding of facts: see— **Ludovick Sebastian vs. R.**, Criminal Appeal No. 318 of 2007 and **Mbaraka Hassani @ Kashumundu vs. R.**, Criminal Appeal No. 145 of 2013 (both unreported).

Both the trial and the first appellate courts have accorded much credence to the evidence of PW3 who they describe as an eye-witness. But the evidence of PW3 does not support the concurrent findings that he was an eye-witness. He merely stated that he saw the act of rape when he was passing near the appellant's house. He did not elaborate whether the alleged rape took place inside the house or outside, how this witness managed to see the rape taking place and how long it lasted.

Again, the first appellate court unquestioned acceptance of the evidence of PW3 suggesting that the appellant was arrested whilst in the act of sexual act with the complainant, is not supported by the evidence of the victim's father, PW2. Nowhere in his evidence does PW2 say that the

appellant was caught red-handed in a sexual act with the complainant. PW2 testified that he sought help from his neighbours who assisted him to arrest the appellant. PW2 and these neighbours then forced the appellant to carry the victim to the WEO:

> *"...Having received this information I informed all my neighbours to apprehend the accused person. My neighbours involved Mataluma Mtweve and Samlelwa and a few to mention. We apprehended the accused to the Kitongoji Chairman one Phillo Mlelwa who referred to the Ward Executive Officer. The victim was In bad health condition. She could not walk on Itself We forced the accused to carry the victim to the Ward Executive Officer....."*

Again, the two courts below did not in their evaluation of evidence; explain why the WEO (PW5) did not mention that he received the five-year old complainant. PW5 testified that the appellant was taken to him— "***....in suspicion of having committed rape of three daughters from his Mbugani village.***"

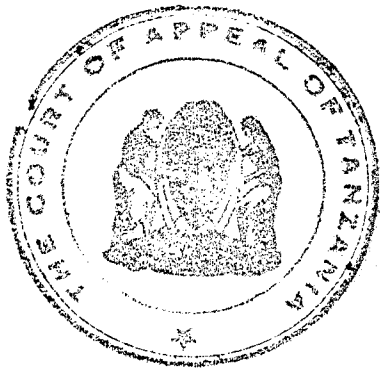
In the upshot of what we have said, we agree with the detailed submissions by Ms Ngilangwa that the two courts below misapprehended

the evidence when they concluded that the evidence by the prosecution proved beyond reasonable doubt that it was the appellant who raped the complainant.

In the result, we find this appeal meritorious, which we hereby allow. The appellant shall be released forthwith from prison unless he is otherwise lawfully held.

DATED at **IRINGA** this 4th day of August, 2016.

S. MJASIRI
JUSTICE OF APPEAL



I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL